6IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 10.04.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Appeal Suit No.682 of 1993
and
C.M.P.No.10710 of 1993

1. Saroja
2. Santha
3. Gopikrishnan ... Appellants/Defendants 1 to 3

Vs.

1. Saraswathi
2. N.L.N.Lakshmanan Chettiar
3. N.L.Valliammal ... Respondents/Plaintiff/Petitioners 4 to 5

PRAYER: First Appeal against the Judgment and decree of the subordinate Court, Virudachalam dated 17.03.1993 and made in O.S.No.9 of 1988.

For Appellants : Mr.L.Kishore for M/s.K.Sridhar
For Respondents : Mr.D.J.Venkatesan for M/s.V.Raghavachari

J U D G M E N T

Defendants 1 to 3 in the Trial Court are the appellants. The first respondent has filed the suit for partition and separate possession of her one third share in the suit property, numbering six items all situated at Kallakurichi. The plaintiff's case is that the plaintiff and first and second defendants are sisters and they are the daughters of Devagiammal and Venugopal Naidu. The third defendant is the son of the first defendant. The said Devagiammal died intestate without male issues on 10.02.1974 and Venugopal Naidu also died on 24.12.1980. The suit properties were acquired by Devagiammal who was in possession and enjoyment till her death.

2. Item No. 1 of the suit property was purchased by Devagiammal on 08.06.1949 under a sale deed marked as Ex.A.1 and that was a thatched house and she has also obtained the adjacent 6 ft. North to South 110 ft East to West land from Subrayalu Naidu her maternal uncle.

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Item No.2 was purchased by Devagiammal under a sale deed dated 17.07.1965 marked as Ex.A.2.

Item No.3 and 4 were purchased under a sale deed dated 11.05.1966 marked as Ex.A.3.

Item No.5 was purchased under a sale deed dated 17.01.1967 marked as Ex.A.4 and

Item No.6 was purchased under a sale deed dated 01.03.1971 by Devagiammal marked as Ex.A.5.

Thus all the six items of properties were purchased by her own money and she had been in possession and she has also put up the terraced house. After death of Devagiammal the plaintiff and defendants 1 and 2 along with Devageammal's husband Venugopal Naidu were each entitled for one fourth share. After the death of Venugopal Naidu who is the father, the first defendant being the elder daughter was managing the property. The plaintiff, defendants 1 and 2 were in joint possession of the suit property except item No.2 which has been excluded from the plaintiff's possession. On the death of Venugopal Naidu the devolution of share has become one third. In spite of the request by the plaintiff, the defendants 1 and 2 who have been enjoying the property have not heeded to the request. The 4th and 5th defendants appeared to have purchased item No.2 from defendants 1 to 3 and according to the plaintiff this will not affect her share.

3. The first and second defendants have filed the written statement, as adopted by the other defendants, denying the averment of the plaintiff stating that Devagiammal had no independent property and she had no income of her own. It was Venugopal Naidu, who was an agriculturalist and also conducting a Transport Company, due to the reason that he has incurred lot of debts in his business to avoid the creditors has purchased the property in the name of his wife. It was Venugopal Naidu who has paid the entire sale consideration in respect of those purchases. Since Venugopal Naidu had no male issues he has adopted his daughter's son the third defendant on 06.02.1976 under a deed of adoption marked as Ex.B.1 and the adoption was given by the mother of the third defendant, namely, the first defendant along with her husband Chakrapani on performance of rituals. The said Venugopal Naidu by a will dated 02.06.1978 marked as Ex.B.2 has bequathed his property in favour of the third defendant. Therefore, the plaintiff has no right. It is also denied that the plaintiff was in joint possession.

4. The plaintiff in the reply statement denied the adoption of the third defendant and also questioned the validity of the will stated to have been executed by Venugopal Naidu in favour of the third defendant on 22.06.1978. The plaintiff also in the reply statement stated that the allegation of purchase of benami by Venugopal Naidu in the name of his wife Devagiammal is not maintainable by virtue of law.

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5. On the basis of the pleadings, the Trial Court has framed the following issues:
1) Whether the plaintiff is entitled for one third share in the suit properties.
2) Whether the third defendant is absolute owner of all the suit property.
3) Whether Venugopal Naidu has adopted the third defendant as his adopted son under the adoption deed dated 06.02.1976?
4) Whether the suit properties were in possession of the plaintiff?
5) Whether court fee paid is correct? and
6) To what relief the plaintiff is entitled?

6. The plaintiff was examined as P.W.1 apart from another witness Muruga Gounder and marked 11 documents as Ex.A.1 to A.11. On the defendants side the third defendant was examined as D.W.1 apart from two other witnesses as D.W.2 and D.W.3 apart from marking 56 documents. On appreciation of evidence and documents filed the Trial Court by holding that Devagiammal was the absolute owner of all the properties and the plaintiff, defendants 1 and 2 and Venugopal Naidu each were entitled one fourth share, has decreed the suit in favour of the plaintiff for one fourth share.

7. In respect of the issue No.4 and 5 regarding possession of the plaintiff as well as the Court fee, the Trial has held that the plaintiff was in joint possession, therefore, the Court fee paid under Section 37(1) of the Court Fee and suit valuation Act is proper. In respect of the issue No.6 the Trial Court has held that since Venugopal Naidu was having one fourth share at the time of death of Devagiammal and by virtue of the adoption deed marked as Ex.B.1 and the will of Venugopal Naidu marked as Ex.B.2 the third defendant is entitled for one fourth share. It is as against the judgement and decree of the Trial Court the defendants 1 to 3 have filed the present appeal.

8. I have heard the learned counsel for the appellant as well as the respondents and on perusal of the entire judgement and documents the following point arises for determination in this appeal.
"Whether the judgment of the Court below in granting one fourth share to the plaintiff, first respondent is legally sustainable?"

9. While the relationship between the parties are admitted and it is also admitted that the six items of properties which are the suit properties, are standing in the name of Devagiammal as seen in Ex.A.1 to A.5 Xerox Copies. The case of the defendants 1 to 3 was that Devagiammal has no means of her own and it was her husband Venugopal Naidu who has purchased the property in the name of his wife Devagiammal benami. It is also their case that since Venugopal Naidu and Devagiammal had no male issue, Venugopal Naidu has adopted the third defendant who is the son of the first defendant as his son. It is relevant to point out that as far as the finding of the Trial Court holding that the third defendant was adopted by Venugopal Naidu under the adoption deed marked as Ex.B.1 dated

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06.02.1976 and finding that the plaintiff has not produced any documents contrary to that or given any evidence against that and relying upon the oral evidence of D.W.2 and D.W.3 out of whom the D.W.2 is the father of the third defendant and therefore, the adoption of the third defendant by Venugopal Naidu was held to be proved and the said finding has become final for the reason that the plaintiff has not challenged the same. Therefore, it is clear that the third defendant was legally adopted by Venugopal Naidu.

10. The dispute raised by the defendants is that even though the suit properties stand in the name of Devageammal, they were actually purchased by her husband Venugopal Naidu in her name benami and in spite of the purchase Venugopal Naidu has been in possession. To substantiate the said contention the defendants would state that the original documents in respect of all the properties except the second item were produced by the defendants. The item No.3 and 4, which are covered under Ex.B.3 sale deed dated 11.05.1966 were stated to have been purchased by the money received by discharge of a mortgage debt under Ex.B.14 dated 13.05.1966 and item No.6 of the suit property which is the subject matter of Ex.B.15 sale deed dated 11.05.1966, was purchased by the money received from the discharge of mortgage debt under Ex.B.16 and B.17 dated 05.03.1964 and 25.06.1966 and therefore, according to defendants 1 to 3 money was given in respect of the purchase of the said items by Venugopal Naidu and the name of his wife Devagiammal was used as benami. Therefore, Devagiammal have no independent right over the property.

11. The Trial Court on appreciation of evidence has held that the defendants who have come forward with a plea that the properties under documents Ex.B.12, B.13, B.15 and B.18 were purchased by Venugopal Naidu in the name of his wife Devagiammal have failed to prove the same with any evidence. In fact the Trial Court has found that when defendants 1 to 3 have specifically stated that Venugopal Naidu was pressurized by the creditors and it is to avoid them the property was purchased by him from out of his own income in favour of his wife Devagiammal, there was no evidence on the side of the defendants to show and prove the particulars about the creditors who have pressurized Venugopal Naidu and what are the documents by which the said Venugopal Naidu was pressurized by his creditors, especially in the circumstance that when Venugopal Naidu himself has purchased a property in his name on 18.07.1965 under a sale deed, copy of which was marked on the side of the plaintiff as Ex.A.10 and in such circumstances the Trial Court has come to the conclusion that the plea of benami raised by defendants 1 to 3 has not been proved and as correctly pointed out by the learned counsel for the first respondent the finding of the Trial Court is not without any reason or perverse or decided on the basis of inadmissible evidence.

12. Having found correctly that the suit property belonged to Devagiammal, the Trial Court has also relied upon the Abolition of Benami Transaction Act, to decide that, when admittedly, the properties stand in

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the name of Devagiammal, there is no question of setting up benami in the name of Venugopal, in addition to the absence of any evidence on the side of defendants 1 to 3 to show that Venugopal Naidu has purchased properties in the name Devagiammal. Having found correctly based on evidence that Devagiammal was the owner of the properties by considering that Devagiammal died on 10.02.1974 as it is seen under Ex.A.6 death certificate and it was only after her death her husband Venugopal Naidu under an adoption deed dated 06.02.1976 marked as Ex.B.1, has adopted the third defendant the factum of adoption having been held to be proved and having found that under Ex.B.2 dated 02.06.1978 Venugopal Naidu has executed a will in favour of the third defendant relating to his properties and after the death of Venugopal Naidu on 24.12.1980 as seen in Ex.A.7. The Trial Court has correctly found that on the death of Devagiammal the said Venugopal Naidu being her husband along with the plaintiff and defendants 1 and 2 being her daughters were each entitled for one fourth share and therefore, at the time Ex.B.2 will was executed, the said Venugopal Naidu was having only one fourth share in the suit properties which alone can be bequeathed by him to the third defendant and on that basis has come to the conclusion that the third defendant is entitled for one fourth share with the result the plaintiff would be entitled only for one fourth share in the suit properties. The said finding is based on the appreciation evidence and conscionable application of mind by the Trial Court and therefore, I have no hesitation to come to the conclusion that the judgement of the Trial Court in granting one fourth share in favour of the plaintiff in the suit property is perfectly in accordance with law.

13. As far as the payment of court fee by the plaintiff which was paid under Section 37(1) of the Court Fees Act, when it is found that the plaintiff was entitled for a share, the possession of the properties by the third defendant on the basis of the will executed by Venugopal Naidu under Ex.B.2 or the possession by defendants 1 and 2 can only be a joint possession along with the plaintiff and in view of the same, there is absolutely no difficulty to come to the conclusion that Court fee paid by the plaintiff under Section 37(2) of the Court fee Act is in order. In fact as correctly pointed out by the learned counsel for the first respondent/plaintiff that the question of payment court fee should be decided on the basis of the averment made in the plaint. The plaintiff in the plaint has specifically stated that "Plaintiff and defendants 1 and 2 are in joint possession of the suit properties except item No.2 which has been excluded from the possession of the plaintiff".

14. As far as item No.2 is concerned it is 4th and 5th defendants who are stated to have purchased the same from the third defendant about which there is no wisper in the written statement filed by defendants 1 to 3 and there is no evidence at all and therefore, it is not necessary to deal with the same. In view of the specific pleading by the plaint, there is no difficulty to come to the conclusion that the valuation in respect of item Nos.1, 3 to 6 is under Section 37(2) and valuation of item No.2 under

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Section 37(1) is in order. That was the decision rendered by the Hon'ble Supreme Court in Neelavathi and others Vs. M.Natarajan and Others reported in 1980(2) MLJ 21 (SC) wherein the Supreme Court has held as follows:

> "6. On a reading of the plaint as a whole we are unable to agree with the view taken by the High Court. It is settled law that the question of court fee must be considered in the light of the allegations made in the plaint and its decision cannot be influenced either by the pleas in the written statement or by the final decision of the suit on merits. All the material allegations contained in the plaint should be construed and taken as a whole."

15. In view of the above said findings, I am of the considered view that the judgement and decree of Trial Court does not require to be interfered with and the same is based on the sound reasoning and therefore, the First Appeal fails and the same is dismissed with cost, confirming the judgement and decree of the Trial Court in O.S.No.9 of 1988 passing a preliminary decree in favour of the plaintiff to the extent of one fourth share and permitting the parties to proceed under Order 20 Rule 10 Code of Civil Procedure for determination of future mesne profits. Consequently, connected C.M.P.is also dismissed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

nbj

To

1. The Subordinate Judge,
Vridhachalam. (with records)

2. The Record Keeper,
V.R.Section, High Court, Madras.

1 cc To Mr.K.Sridhar, Advocate, SR.23183.
1 cc To Mr.V.Raghavachari, Advocate, SR.22755.

A.S.No.682 of 1993

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